BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)	WT Docket No. 05-211
	)	
Auction of Advanced Wireless Services Licenses Scheduled for August 9, 2006 (rev. FCC 06-71)	)	AU Docket No. 06-30

To: The Commission

FURTHER SUPPLEMENT TO MOTION FOR EXPEDITED STAY

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May 25, 2006

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SUMMARY

In this Further Supplement, Joint Petitioners update their showing in support of their Motion for Expedited Stay to address the Commission's recent decision to postpone Auction 66 until August 9, 2006. The following points are made:

- The postponement of Auction 66 serves no purpose in the absence of a stay of the rules themselves. Providing additional time for prospective bidders to adapt to rules that are unsupported by the record, unclear in their application, and inconsistent with statutory requirements simply defers the problem without resolving it.
- Stay or rescission of the revised unjust enrichment provisions and new "material relationship" restrictions adopted in the *Second Report & Order* is necessary to avoid irreparable harm to designated entities ("DEs") whose financing arrangements have been unexpectedly undermined at the eleventh hour by the rule changes that conflict with statutory requirements. A stay of the rules should require, at most, only a very brief further postponement of the auction.
- Joint Petitioners' legal objections to the manner in which the Commission adopted the revised DE rules are compelling and meritorious. The final rules were not legitimately a "logical outgrowth" of any Commission proposal. Logical outgrowth may only be found if interested parties should have anticipated that the change was possible, and thus should have expressed their views on the subject during the notice-and-comment period. In the *FNPRM*, the Commission proposed no specific rules, and its self-proclaimed tentative conclusion was to adopt a rule focused only on how a DE's material relationships with "large in-region incumbent wireless service providers" should result in restricted DE benefits.

- CTIA and T-Mobile's arguments contesting Joint Petitioners' showing of irreparable harm incorrectly assume that the economic losses ultimately would be recoverable through legal action. But once the unique opportunity presented by the AWS auction passes, no adequate relief will be available at a later date because there is no cause of action by which either Petitioner could recover damages deriving from its exclusion from Auction 66. The "threat of unrecoverable economic loss" qualifies as irreparable harm and will support injunctive relief.
- Moreover, given Council Tree's investment mission and the importance of the AWS auction, the harsh impact of the April 25 rule revisions would even threaten the continued operation of Council Tree's business, harm that is incontrovertibly irreparable.
- Joint Petitioners' provide as part of this Further Supplement updated declarations from principals of Council Tree and BNC on the issue of irreparable harm.

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FURTHER SUPPLEMENT TO MOTION FOR EXPEDITED STAY

The Minority Media and Telecommunications Council ("MMTC"), Council Tree Communications, Inc. ("Council Tree"), and Bethel Native Corporation ("BNC") (together referred to hereinafter as the "Joint Petitioners") hereby further supplement their Motion for Expedited Stay Pending Reconsideration or Judicial Review ("Motion for Stay") with respect to the Commission's *Second Report and Order and Second Further Notice of Proposed Rule Making* (FCC 06-52) adopted and released in WT Docket 05-211 on April 25, 2006 ("*Second Report and Order*"). The Joint Petitioners are seeking an immediate stay of the rules adopted in the *Second Report & Order* and, depending on the timing and substance of the Commission's action, potentially a further postponement of the Advanced Wireless Service ("AWS") Auction, Auction 66, which is now scheduled to begin on August 9, 2006, instead of June 29, 2006.[1]

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[1] *See* Public Notice, "Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006," FCC 06-71 (released May 19, 2006) ("AWS-1 Auction Postponement Notice").

1. The Brief Stay of Auction 66 Does Not Address The Issues Pending In Joint Petitioners' Motion For Stay.

The Commission's decision to postpone Auction 66 until August 9, and to reopen the filing window for Form 175 short-form applications, serves no purpose in the absence of a stay of the rules themselves. Providing prospective bidders additional time to adapt to rules that are unsupported by the rulemaking record, unclear in their application, and inconsistent with statutory requirements simply defers the problem without resolving it.[2]

The issuance of a stay of the revised unjust enrichment provisions and new "material relationship" restrictions adopted in the *Second Report & Order*, and clarification that the rules in place prior to April 25, 2006 will apply to licenses offered in Auction 66 without change in the future, should require only a very brief further postponement of the auction (*e.g.*, providing 30 days between announcement of the stay of the rules and the closing of the short-form filing window). On the other hand, if the Commission issues such a stay for the purpose of giving notice and allowing proper comment on the substantial changes abruptly adopted in the *Second Report & Order*, the further postponement of Auction 66 would necessarily be considerably longer.

In either case, stay of the rules is necessary to avoid irreparable harm to designated entities ("DEs") that were unfairly surprised, and whose financing arrangements have been undermined, by the rule changes that were adopted in a manner inconsistent with multiple

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[2] Despite the postponement of Auction 66 "to provide applicants additional time for preparing and planning," the timing of the rules and the impact described above on DE investment remains contrary to Section 309(j) of the Act. Following enactment of Section 309(j)(3)(E)(ii), the Commission has established a standard practice that significant changes to the core bidding rules contained in Subpart Q will only become effective *sixty* days following publication in the *Federal Register*, rather than the thirty days provided for in the *Second Report & Order*. *See, e.g., Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, Third Report & Order, 13 FCC Rcd 374 (1997).

statutory requirements. A further stay of Auction 66 is also needed to ensure that the awarding of licenses via competitive bidding is neither adversely impacted by the flawed rules nor proceeds with them in place, potentially leading to a need to unwind the results, reclaim licenses, and conduct a new auction at some time in the distant future. That scenario would be the worst possible outcome for all concerned.

2. Reliance by the Commission on the Representations of CTIA and T-Mobile in Opposition to the Motion For Stay Is Misplaced.

To the extent that the Commission has relied upon Oppositions to the Motion for Stay filed by CTIA - The Wireless Association ("CTIA") and T-Mobile USA, Inc. ("T-Mobile") in its decision to postpone the auction by six weeks, while so far leaving the new rules in place in their entirety, that reliance is misplaced. First, the asserted policy justifications provided by CTIA and T-Mobile in Opposition to the Motion for Stay were directed wholly toward any postponement of the *auction* beyond June 29, 2006.[3] Indeed, T-Mobile indicated that it had opposed any change in the rules from the outset.[4] The Commission has now determined that a six week postponement of the auction is in the public interest, necessarily finding that potential harm to these parties, if any, is outweighed by other public interest factors.

Second, to the extent that CTIA and T-Mobile may insist on conducting the auction with the unexpected new rules in place, their motivations are readily apparent. CTIA is a trade association that serves the interests of the large incumbent wireless carriers, which include T-Mobile. These incumbent service providers would like nothing better than to enjoy the economic benefits of an important spectrum auction in which participation by new entrants is

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[3] *See* CTIA Opposition at 3-4, 7-8 & 14-17 ("CTIA strongly opposes any request to stay the beginning of Auction 66" (p. 7)); T-Mobile Opposition at 1-2, 15-16 (arguing that any delay in the auction would be harmful).

[4] *See* T-Mobile Opposition at 6.

limited due to the chilling effect of the new material relationship and unjust enrichment rules upon debt and equity investment in DE companies. The large carriers would reap the dual benefits, from their perspective, of reduced opportunity for competing providers and an increased likelihood that they will be able to obtain an even larger share of U.S. wireless spectrum resources at lower cost than might otherwise have been anticipated.

Such an anticompetitive outcome is wholly antithetical to the purpose of this proceeding, which is governed by Congress's statutory directive to increase opportunities for new entrants "to participate *effectively* in the bidding process."[5] At the outset of the proceeding, the Commission expressed its desire to adhere to that statutory requirement, declaring that it was required to "strike a delicate balance between encouraging the participation of small businesses in the provision of spectrum based services, and ensuring that those small businesses who do participate in competitive bidding have sufficient capital and flexibility to structure their businesses to be able to compete at auction, fulfill their payment obligations, and ultimately provide service to the public."

A. Contrary to the Stay Opponents' Assertions, Joint Petitioners Have A Strong Case for Stay On The Merits.

The harsh impact of the revised rules on DEs preparing for Auction 66 is flatly contrary to Section 309(j)(3)(B) of the Act, which requires the Commission to promote "economic opportunity and competition" by "avoiding excessive concentration of licenses" and disseminating those licenses among a "wide variety of applicants," including small businesses and minority- and women-owned businesses." Even if the new rules were consistent with the statutory command, however, the Commission provided inadequate notice in its *Further Notice*

[5] H.R. Rep. No. 105-217, at 572 (1997) (Conf. Rep.) (Section 3002 of the Balanced Budget Act of 1997, Pub. L. No. 105-33) (emphasis added).

of Proposed Rule Making[6] that it would adopt sweeping changes in the Competitive Bidding Rules, extending the "material relationship" restrictions to all types of entities and doubling the time period during which the unjust enrichment rules apply, thereby impacting both new applicants for future auctions *and* existing DE licensees.

Both CTIA and T-Mobile nonetheless argue that the rules adopted in the *Second Report & Order* were a "logical outgrowth" of the initial proposal. *See* CTIA Opposition at 10; T-Mobile Opposition at 8-9. But a final rule is a "logical outgrowth" only if interested parties "should have anticipated that the change was possible, and thus reasonably should have filed comments on the subject during the notice-and-comment period."[7] The Commission's rules were neither the subject of proper notice nor the logical outgrowth of what the Commission had proposed. In the *FNPRM*, the Commission proposed no specific rules, and its self-proclaimed tentative conclusion was to adopt a rule focused on how a DE's material relationships with "large in-region incumbent wireless service providers" should result in restricted DE benefits.[8] The Commission also sought comment on how to define material relationships, and whether a material relationship should also be considered with an "entity with significant interests in communications service."[9]

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[6] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Further Notice of Proposed Rule Making, 21 FCC Rcd 1753 (2006) ("*FNPRM*").

[7] *International Union, United Mine Workers of America v. Mine Safety and Health Administration*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

[8] *FNPRM* at 1.

[9] *See e.g.*, *FNPRM* at 10-11, 14.

T-Mobile claims that the FCC provided adequate notice that material relationships could arise with other entities *outside* of the communications industry.[10] However, the heading for Paragraph 19 is explicitly labeled "Entities with Significant Interests in Communications Services" and the reference to "additional entities" merely sought comment on whether other types of communications service providers ought to be included within that definitional category.[11] Even if a few commenters relied on this language to urge a broader application of the contemplated rule, it does not mean the notice was sufficient to alert interested parties within the meaning of 5 U.S.C. § 553.[12] Notice cannot be bootstrapped from a comment; the Commission itself was required to provide notice of a regulatory proposal – particularly in the case of far-reaching changes such as those adopted by the Commission here.[13]

The stark absence of comments from DEs that are current licensees is also a relevant indicator of the inadequacy of notice to this category of regulatees that they might be affected by the new rules. There is no evidence that any commenter (not even CTIA or T-Mobile) expected a 25%/50% of spectrum capacity limitation – or an expansion of the unjust enrichment schedule that would apply to current licensees.[14] Additionally, the mere mention of "spectrum capacity" in an *FNPRM* footnote does not provide adequate notice that such a term might be given

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[10] T-Mobile Opposition at 9 (citing to *FNPRM* at para. 19).

[11] *FNPRM* at 19**.**

[12] *Wagner Electric Corporation v. Volpe*, 446 F.2d 1013, 1018 (3d Cir. 1972) (finding that the absence of comments from all parties affected by the rule, notwithstanding comments from a few knowledgeable parties, is sufficient to find inadequate notice under the APA).

[13] *AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985). The courts have established that "it is both unreasonable and inconsistent with governing precedent to presume that these isolated comments would come to the notice of other parties."

[14] T-Mobile Opposition at 3, n.6 ("But if Petitioners' interpretation is correct [referring to the new 10-year unjust enrichment schedule] T-Mobile agrees that that particular aspect of the decision is unreasonable and unlawful").

substantive weight in the application of a new limitation on licensee conduct.[15] Interested parties – in this case, *all* DEs – could not have foreseen the impending rule revisions adopted by the Commission. By the FCC's own admission, proof of retroactivity is in the Final Regulatory Flexibility Analysis in which the FCC materially modified the class and identification of small entities subject to the final rule to include *current* licensees.[16] Agency action is not valid where, as here, the *FNPRM* "contains, nothing, not the merest hint," that the agency was considering changes of the character ultimately adopted in the final rule.[17] Significantly, the FCC reported to Congress in its 2003 Triennial Report, that its Secondary Markets Initiative helped to relieve market entry barriers; that the changes in that proceeding which concerned spectrum leasing arrangements helped "further the ability of licensees and entities that seek to gain access to spectrum, including entrepreneurs and small businesses, *to enter in arrangements best suited the parties respective needs and business models*."[18] Since the 2003 Triennial Report, the FCC reaffirmed its conclusion that small entities should continue to have flexibility in their business arrangements in its Second Report and Order issued in 2004 and affirmed its earlier conclusion

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[15] *McElroy Electronic Corp. v. FCC*, 990 F.2d 1351, 1362, 1364-65 (D.C. Cir. 1993) (statement buried in a footnote did not provide clear notice to public of Commission's intent).

[16] *See* Joint Petitioners' May 17 Supplement at 4-5.

[17] *Kooritzky*, 17 F.3d, at 1503.

[18] *In re* Section 257 Triennial Report to Congress; Identifying and Eliminating Market Entry Barrier for Entrepreneurs and Other Small Businesses, *Report*, 19 FCC Rcd 3034, 3081 (2003) ("*2003 Section 257 Report to Congress*")(citing to Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20,604 (2003)(emphasis added). The Commission also has long expressed the view that the public interest is best served by allowing licensees to make their own business determinations based on marketplace forces. *See, e.g.*, *Amendment of Section 73.3597 of the Commission's Rules*, 52 R.R. 2d 1081, (¶ 23) (1982) (Eliminating the broadcast license trafficking rule, which effectively required broadcast licensees to hold their authorizations for at least three years, stating, "We find that in this competitive environment the public interest is usually best served by allowing station sales transactions to be regulated by marketplace forces").

that lease of "substantially all" of a licensee's spectrum capacity would result in attribution of the lessee.[19] AWS Auction Designated Entities that are not involved with a large incumbent wireless carrier and other prospective and current DEs that did not plan to participate in the AWS auction expected to have flexibility in their business arrangements as long as the relationship did not run afoul of the FCC's *de jure* and *de facto* control requirements. Moreover, there is no mention of "resale" or "wholesale" relationships in the *2003 257 Report to Congress*, nor in the *2004 Second Report and Order* in the secondary markets proceeding, only references to "'spectrum leasing' arrangements"[20] confirming that the restrictions on resale and wholesale relationships in the AWS Auction proceeding were unexpected and without proper notice and comment.

In essence, the FCC's new numeric limitations on spectrum capacity mandate that a new entrant's business must be at minimum 50% retail if it wants to retain its DE status, even though it is more expensive to build and sustain a retail-based communications business from scratch. Coupled with the difficulty in securing private equity and debt financing due to the new 10 year unjust enrichment period, the FCC's additional restrictions on the type of business model a DE must have, the market entry barriers have increased – not decreased.

B. Joint Petitioners Have A Strong Case For Irreparable Harm Arising From The Changes to the DE Rules.

The same reasons that T-Mobile cites to demonstrate the importance and uniqueness of the AWS auction also supports the Motion for Stay, and provides the very foundation of the irreparable harm that has been and will be suffered by BNC and Council Tree if this auction is

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[19] *In re* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17542 (¶ 77) (2004) ("*2004 Second Report and Order*").

[20] *Id*. at 17536-44, and *2003 Section 257 Report to Congress*, at 3081 (¶ 155).

allowed to go forward without resolving the issues raised herein and in Petitioners' other filings. T-Mobile states that "[t]hese licenses are the first full blocks of nationwide spectrum to be made available for wireless broadband services in a decade – they encompass a full 90 megahertz of spectrum and cover the entire United States. Failure to disseminate these licenses rapidly would undermine carrier efforts to ensure that consumers have access to the increasing range of affordable and innovative wireless services they demand and deserve."[21] CTIA and T-Mobile also recognized the importance of new entrants, such as BNC, to participate in this auction. "Auction 66 represents a vital opportunity for *new entrants* and existing carriers to obtain the spectrum they need to succeed in the highly competitive wireless marketplace."[22]

Both CTIA and T-Mobile contest the Joint Petitioners' showing of irreparable harm. CTIA states that the Joint Petitioner's showing "does not allege anything more than remote and contingent economic effects that could still be remedied in time for the auction. . . ."[23] This argument conveniently ignores the fact that the impact of the rules is widespread and permanent. CTIA's claim that all BNC had to do was to "submit preliminary paperwork [and] may still seek sufficient financing before the date of deposit" is both ill-informed and disingenuous.[24] CTIA Opposition at 14. This argument unrealistically ignores the real world impact of the uncertainty created by the dramatic last minute alterations of the bidding rules. Prudent investors no longer have a comfort level with the limitations placed on DE's, resulting in a general chilling effect on DEs that makes it effectively impossible to replace lost capital and expertise. Regardless of the

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[21] T-Mobile Opposition at 5.

[22] CTIA Opposition at 8, n15 (citing to T-Mobile's Reply Comments) (emphasis added).

[23] CTIA Opposition at 4.

[24] There are legal costs and filing fees incurred with filing even preliminary paperwork with the FCC, and small entities do not have the luxury of expending resources or of incurring expenses for an exercise in futility.

minor postponement in the auction date, the relatively brief time period remaining before short-form applications and upfront payments are due, coupled with the adverse impact of the rules on investor confidence, makes any participation in this auction a practical impossibility for entities such as BNC, which cannot hope to attract serious investors in the environment that the *Second Report & Order* has wrought.[25] BNC's or Council Tree's circumstances would not and will not change until the FCC's rules change.

Furthermore, T-Mobile's claim that BNC can simply sit this one out and participate in the next auction is also disingenuous, particularly in light of T-Mobile's origins as a DE.[26] There would be no T-Mobile today if its predecessor company, Western Wireless, had been required to sit out of the various auctions that enabled this former new entrant to become a national carrier. In fact, the history of the FCC's competitive bidding program is fraught with market entry barriers experienced by new entrants and DEs when the FCC allowed large incumbent providers to participate in auctions first.[27]

CTIA and T-Mobile also complain that the particular harm addressed in the Motion involves just a "single entity," that there is no showing "that the new DE rules will drive any entity out of business entirely," and that "upsetting an entity's economic expectations does not rise to the level of irreparable harm, as 'economic loss in and of itself cannot support a claim of irreparable harm.'"[28] But these observations do not accurately define the scope of circumstances

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[25] *See* Declaration of Anastasia C. Hoffman, President and CEO, Bethel Native Corporation at ¶ 10.

[26] T-Mobile Opposition at 14 n. 39.

[27] *See, e.g.*, Edward Warner, *FCC Nominees Set for Senate Vote,* Wireless Week (October 13, 1997) (reporting that then-nominee for FCC Chairman, William Kennard, stated that he would have scheduled the PCS C-block auction before the A and B blocks, because small businesses needed the first shot at financing).

[28] T-Mobile Opposition at 14; CTIA Opposition at 13 & 14.

where injunctive relief is available. The propositions the Oppositions rely upon rest on assumptions that the economic losses at issue are actually recoverable through a separate legal action.[29] "The threat of unrecoverable economic loss, however, does qualify as irreparable harm."[30] Such a "nonrecoverable monetary loss" will support injunctive relief, even though in other cases a recoverable monetary loss that "may constitute irreparable harm" will support relief "only where the loss threatens the very existence of the movant's business."[31] Even so, given Council Tree's investment mission and the importance of the AWS auction, the harsh impact of the April 25 rule revisions does threaten the continued operation of Council Tree's business. [32] Moreover, both Council Tree and BNC had spent many months negotiating financing that was premised on the then existing DE rules, with the expectation that arrangements could be quickly finalized prior to the AWS auction short form filing deadline.[33] Following the announcement of the new rules, prospective partners of both BNC and Council Tree promptly withdrew from discussions as a direct result of the new rules.[34] Because of the unexpected impact of the rule changes, these parties have been effectively precluded from participating in the auction as planned.[35]

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[29] *Iowa Utilities Board v. Federal Communications Commission*, 109 F.3d 418, 426 (8th Cir. 1996), distinguishing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1984).

[30] *Iowa Utilities Board*, 109 F.3d at 426 (granting partial stay of FCC rules because aggrieved ILEC's would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules were eventually overturned or through participation in the market").

[31] *Express One International, Inc. v. USPS*, 814 F. Supp. 87 (D.D.C. 1992).

[32] *See* Declaration of Steve C. Hillard, President and CEO, Council Tree Communications, Inc., at ¶ 12(c).

[33] *See* Hoffman Declaration at ¶ 9; Hillard Declaration at ¶¶ 5-7.

[34] *See* Hillard Declaration at ¶¶ 6 and 7; Hoffman Declaration at ¶ 10.

[35] Hillard Declaration at ¶¶ 9-13; Hoffman Declaration at ¶ 11.

As in the cases cited above, absent a corrective stay, neither BNC nor Council Tree will be able to recover the opportunity that existed going into Auction 66. The prospect of obtaining newly available AWS spectrum is a unique business opportunity, and once that opportunity passes, no adequate compensatory or other relief will be available at a later date.[36] This is so both because such losses would be hard to calculate and because there is no cause of action by which either Petitioner could recover damages deriving from its exclusion from the auction, as the FCC cannot be sued for civil damages.[37] The harm to the Petitioners is irreparable, and, by all objective measures, it warrants a stay.

At the same time, as amply demonstrated in the initial Motion for Stay, no third party would suffer harm from the issuance of a stay, which would simply cause the rules applicable to Auction 66 to revert to those that existed prior to April 25, 2006 – the very rules upon which all parties relied in preparing for the auction until that date. In response, CTIA vaguely asserts that a stay would cause "harm to virtually every other participant in the auction" and T-Mobile complains with an equal absence of clarity that a delay in the auction "could undermine the Commission's interest in deploying more spectrum to promote competition and innovation in the wireless market."[38] No supporting information is provided to buttress these claims. Accordingly, there has been no showing of any harm that might be weighed against the clear preclusive effect of the new rules upon Council Tree, BNC and others that could have

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[36] *See Coastal Distribution v. Babylon*, 2006 U.S. Dist. LEXIS (E.D.N.Y. 2006), *citing Register.com v. Verio,* 356 F.3d 393 (2d Cir. 2004) ("loss of business opportunities and relationships with clients who could 'produce an indeterminate amount of business over years to come' are also hard to measure in dollars and are properly considered irreparable harm.'").

[37] *See Iowa Utilities Board*, 109 F.3d at 426. *See also Bracco Diagnostics v. Shalala*, 963 F. Supp. 20, 21 (D. D.C. 1997) (equitable relief granted where there was economic injury for which there is "no adequate compensatory or other corrective relief that can be provided at a later date").

[38] CTIA Opposition at 11; T-Mobile Opposition at 15.

participated in Auction 66 but for the impact of the rules adopted in the *Second Report and Order*. At most, as a result of the grant of the relief Joint Petitioners seek, including a brief stay in the Auction 66 commencement date, some prospective Auction 66 bidders might find themselves inconvenienced, but they would not be harmed.[39]

Similarly, the public interest strongly weighs in favor of a stay due to the important statutory interests that would be vindicated.[40] CTIA and T-Mobile contest this showing, arguing that a stay of the auction would conflict with the desire of the Commission to "proceed with Auction 66 in a timely manner."[41] Inasmuch as the Commission's charge under Section 309(j) is to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or *judicial delays*,"[42] the imperative is that the Commission get things right, in preference to moving in haste to meet some artificial date for commencement of bidding.[43] Additionally, the Commission is required to *identify and eliminate* market entry barriers using its regulatory authority for small businesses under Section 257 of the Communications Act.[44] This is a circumstance where a further short delay is likely to

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[39] *See* Hillard Declaration at ¶ 13.

[40] *See* Motion for Stay at 22-23.

[41] T-Mobile Opposition at 15.

[42] 47 U.S.C. § 309(j)(3)(A) (emphasis added).

[43] For example, in postponing the 700 MHz auction until January 2001, the Commission relied on the statutory command of Section 309(j)(3)(E) to allow sufficient time for licensees to develop their plans, even where a different statutory provision required the auction proceeds to be deposited in the U.S. Treasury by September 30, 2000. *See Auction 31 Postponement*, 15 FCC Rcd at 17409 & 17410; 47 U.S.C. § 337 Note at Sec. 213(a)(3) (Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 2502, Appendix E, § 213(a)(3)).

[44] 47 U.S.C. § 257 (emphasis added).

prove beneficial by avoiding a much longer delay that could result from failure to follow the dictates of the Communications Act.

3. Conclusion

For the reasons set forth in the Motion for Stay, as expanded upon in the Joint Petitioner's May 17 Supplement and this Further Supplement, the Commission should either immediately stay, or set aside entirely, each of the rule changes adopted as part of the *Second Report and Order*, thereby retaining for Auction 66 the rules currently in effect. The auction itself should be postponed for an additional brief period, and the filing window for short form applications extended as well, to the extent necessary to allow prospective DE bidders, consistent with the Communications Act, "sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services" in reliance on the reinstated rules.

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May 25, 2006

DECLARATION OF ANASTASIA C. HOFFMAN
BETHEL NATIVE CORPORATION

Re: Further Supplement to Motion for Expedited Stay,
WT Docket No. 05-211 and AU Docket No. 06-30

I, Anastasia C. Hoffman, under penalty of perjury, hereby declare that the following is true and correct:

1. I am President and Chief Executive Officer of Bethel Native Corporation ("BNC"), an Alaska Native Village Corporation organized under the terms of the Alaska Native Claims Settlement Act, 43 U.S.C. §§1601 et seq. ("ANCSA"). BNC is 100% minority-owned. Its shareholders consist of approximately 1800 individuals of principally Yup'ik Eskimo descent of whom 53% are women. Many of BNC's shareholders and their families have incomes at or below poverty line.

2. BNC is headquartered in Bethel, Alaska, a geographically isolated community which cannot be reached by road and which is located in the economically depressed southwestern portion of Alaska. Most of the residents of Bethel are also direct shareholders of BNC or members of their families. The performance of BNC is therefore an integral part of the economic health of our community. In addition, Western Alaska, including communities such as Bethel, has very limited telecommunications facilities, and no real broadband access for ordinary residents. BNC's various operations and investments also service the 6,000 plus population in the City of Bethel, including the 56 outlying remote villages.

3. In providing for the creation of BNC and other Alaska Native Corporations, Congress undertook a unique social experiment. As Alaska Natives continued to suffer the grave

social and economic hardships resulting from the disruption of their culture and lifestyle, they also demonstrated their legitimate claim to land in Alaska. Congress passed ANCSA to address these realities. Rather than form a system of Alaska Native reservations, however, Congress directed that Alaska Natives be enrolled as shareholders of corporations within their geographic region, and that the corporations issue to their members shares that could not be sold or otherwise pledged. Thus, Alaska Natives were propelled into the world of corporate shareholder status but with limited access to capital. They became the owners of corporations that, at the direction of Congress, hold the collective results of their settlements with the federal government. In turn, Native Corporations are assigned the task of earning profits for those shareholders and attending to the shareholders' real social and economic needs.

4. No one recognizes the importance and complexity of that task more than the governing boards of directors and managers of corporations such as BNC. At BNC, we view diversification of our limited investment capital as a critical goal, along with providing critical services and infrastructure to our community. We have chosen to seek opportunities in the telecommunications industry as part of this process of diversifying our economic base and providing critical social and basic services to our shareholders. As with many minority-owned businesses, access to capital and expertise is a formidable hurdle for participation by small business telecommunications companies.

5. BNC appreciates the growth potential that telecommunications services provide both from a financial perspective, and also from the perspective of community improvement, and it sees the provision of these telecommunications services as a central facet of the company's strategy for the future to improve the lives of our shareholders and other Bethel residents.

However, entering this new industry can be very difficult. Telecommunications operations are highly capital intensive, which makes competing for valuable federal licenses against entrenched telecommunications providers especially difficult.

6. Congress recognized this reality when, in 1993, it directed the Commission to consider a variety of measures to ensure that small businesses, rural telephone companies, and businesses owned by minorities and women are given the opportunity to participate in the provision of spectrum-based services when licenses are to be awarded through competitive bidding. In the case of BNC, this is an important opportunity, as we undertake to provide much needed telecommunications services to our shareholders and broaden the economic base of our community.

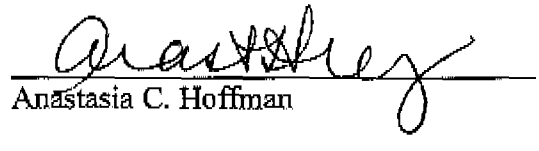
7. An important component of our plan for entering this industry is our vision to participate in the development and improvement of telecommunications services in Alaska. Telecommunications services are critical to our shareholders and to others in the vast expanse of Alaska. This dependence stems from the unique geographic and demographic conditions in Alaska, which stretches across 586,000 square miles of wilderness. Alaska Natives generally live in regional centers such as Bethel, Barrow, Kotzebue, Nome and Dillingham, and in some 220 rural Alaskan villages scattered throughout the state, where there are virtually no meaningful road systems and very limited telecommunication facilities. The 56 outlying villages in the City of Bethel have no roads to connect to the City and are accessible only by river transportation. These villages do not have access to landline or wireless services. Lack of such basic communications in such a remote area is a public safety issue, as evidenced by the increased number of search and rescue efforts this past winter. Bethel has internet access through dial-up and DSL but the geographic limitations of DSL do not provide service to the entire community.

8. The FCC's Auction 66, the largest auction of spectrum in U.S. history, is a unique and crucial one-time chance for companies such as BNC to enter into the telecommunications industry. If we are deprived of an opportunity to participate in this auction, we will be irreparably harmed because there will be no other opportunity even remotely similar for participation in the wireless industry. There is no better opportunity for BNC to bring much needed advanced telecommunications services to its underserved community in a manner that will meet its dual objective of improving social and infrastructure services to its shareholders and the Bethel community while achieving the profitability that will enable it to maintain the traditional cultural lifestyle. BNC is a potential bidder that has a high use and value for the spectrum.

9. When the Commission issued the *Second Report and Order and Second Further Notice of Proposed Rule Making ("Second Report and Order"* in WT Docket No. 05-211 (FCC 06-52), BNC, along with Council Tree and others were finalizing agreements that would give the backing that it needs to bid for licenses in Auction 66, build its network, and provide service. However, in that *Second Report and Order*, the Commission changed the unjust enrichment rules that would apply to BNC and its other investors, substituting a ten-year unjust enrichment schedule for the five-year schedule that has applied for many years. The *Second Report and Order* also instituted a new policy requiring full repayment of any bidding credit in many cases where the construction requirements applicable at the end of the license term have not been met. The Commission issued the *Second Report and Order* just two weeks before the Auction 66 application deadline. Although the Commission has recently postponed the auction to start on August 9, instead of June 29, and established a new short form application deadline, this additional time does not solve BNC's problems.

10. The effect of the *Second Report and Order* on BNC has been clear. BNC's prospective investors have withdrawn their commitments as a result of the new unjust enrichment rules announced in the *Second Report and Order* and the regulatory uncertainty created by the Commission's eleventh-hour action. For the same reasons, BNC has been unable to find other sources to replace the lost capital and expertise. Although the Auction 66 short-form application deadline is a few weeks away instead of days, no time is sufficient to address the fatal problems with the rule and to ensure potential investors that the FCC will not change the DE rules retroactively in the future. The nature of the new rules in the *Second Report and Order*, individually and in combination and the lack of notice and comment preceding their adoption, have completely destabilized the business plans and financing efforts underlying participation in Auction 66.

11. For this reason, BNC did not file a 175 short form application on May 10, 2006, the first deadline. It will not file by the new short form deadline. However, we believe that we could restore some or all of the transaction we lost as a direct result of the Second Report and Order if the Commission made clear that the rules in place before the Second Report and Order will apply to Auction 66 and the resulting licensees, and that in the future, no new rules that directly impact the eligibility of DEs will be applied retroactively. If the Commission stayed the effectiveness of the new rules, business relationships formed in reliance on the existing rules might well be restored If the new rules stay in place, then BNC and many minority and women-owned companies will not have a meaningful basis or opportunity to effectively participate in Auction 66 as Congress clearly intended.



Anastasia C. Hoffman

May 24, 2006
Date

DECLARATION OF STEVE C. HILLARD
COUNCIL TREE COMMUNICATIONS, INC.

Re: Further Supplement to Motion for Expedited Stay,
WT Docket No. 05-211 and AU Docket No. 06-30

I, Steve C. Hillard, under penalty of perjury, hereby declare that the following is true and correct:

1. I am President and Chief Executive Officer of Council Tree Communications, Inc. ("Council Tree"), a corporation incorporated in the State of Delaware. In response to many studies outlining the dramatic failure of the public and private sector to develop diversity of ownership in the communications industry, I founded Council Tree in 1998. Its mission, then and now, is to responsibly promote diversity of ownership in the communications industry. Council Tree operates as an investment advisor and/or an investor in various transactions.

2. Council Tree's principals and employees have been involved in the communications industry for decades. Council Tree and I personally have played a significant role in transactions that have helped create controlling ownership positions by Native American, Hispanic, and African-American groups (many of them also controlled by women) in both broadcast and telecommunications properties nationwide. Illustrative of these are the following: (a) advising and creating the nation's largest minority-owned broadcast company, (b) increasing minority ownership of television stations in the Top U.S. markets by 25% through construction of the last full-power television station serving Philadelphia, (c) bringing Native American and Hispanic groups into the controlling entity of the Telemundo Network, and (d) advising entities with over 40,000 Native American shareholders on transactions in which they acquired wireless licenses throughout the U.S., in markets ranging from New York City to Boise, Idaho. Much of this effort has been aimed at supporting competitive new entry, and serving rural and underserved markets that include minorities, low-income subscribers and viewers.

3. The Designated Entity program was mandated by Congress, as a fundamental part of the authority for auctioning federal spectrum licenses, to ensure that there was a meaningful opportunity for wide dissemination of licenses, and to promote diversity of ownership including small, rural and minority and women-owned businesses. These important goals require that the Federal Communications Commission (the "Commission") adopt clear, fair, and reliable sets of rules, with adequate timeframes for implementation, so that the capital markets are willing to work with Designated Entities. Council Tree is

qualified as a Designated Entity under the rules of the Commission and has been preparing over the past year to participate in the Commission's Spectrum Auction 66 (the "AWS Auction").

4. The AWS Auction is an absolutely unique allocation of spectrum. It has these four crucial attributes:

   a. It is the largest spectrum auction in United States history with 90 MHz of prime CMRS spectrum nationwide.

   b. The spectrum is uniquely compatible with both existing cellular systems and new WI-FI and WI-MAX broadband technologies that promise to bring broadband services to rural and underserved communities.

   c. As an available source of highly useable spectrum, it holds the potential to act as a balance against previously-licensed cellular wireless service spectrum which has been heavily consolidated and is now 90%-owned by just five companies in the U.S. As the gateway to new and competitive wireless services in the U.S., the AWS Auction will determine the future competitive landscape in this industry – in other words, it will decide who (if anyone) will be in a position to compete against those five providers.

   d. This one-of-a-kind spectrum block is already divided into segments specially designed to provide entry points for small businesses, and is one point where an entrant can gain access to a critical position in terms of spectrum and geography to allow successful competition within this heavily-consolidated industry. It is impossible to replicate this opportunity.

5. Council Tree spent the past year actively planning to participate in the AWS auction in its own right as a DE licensee, and/or as one of several investors with Bethel Native Corporation ("BNC"), a co-petitioner in this Motion for Stay. The business plan was to provide new wireless, voice, data and broadband service to underserved, rural and low-income customers in cooperation with BNC. For example, that business plan encompassed providing affordable, reliable, and state-of-the art broadband services to remote, truly underserved, villages in Alaska, such as those in and around Bethel. The Commission's long-established rules for the Designated Entity program have long allowed for the flexibility to provide liquidity to investors (e.g., to sell the business if necessary) at the end of five years after the license was awarded after auction if the business plan was not being met. That flexibility is essential to bring investors into a start-up wireless entity.

6. Council Tree had negotiated detailed term sheets with other experienced and qualified investors, and was in the process of drafting with those investors the

complete final agreements to provide financing for participation in the AWS Auction when, on April 25, 2006, the FCC's Second Report and Order and Second Order on Reconsideration (the "New DE Order") was adopted and released in WT Docket 05-211. The New DE Order has had a devastating impact and, if not stayed, will also have an irreparable adverse effect on Council Tree and other Designated Entities that had planned to actively participate in the AWS Auction.

7. As soon as the New DE Order was issued, these experienced investors were shocked and surprised by the unexpected new rules, the ambiguity of the order, and the fact that the order would place new burdens retroactively on current DE licensees. These investors almost literally "fled for the exits" based on the uncertainty and burden created by the new rules. To paraphrase one investor: "We can't move fast enough, we can't understand, we can't predict, and we can't rely on what the Commission is doing here."

8. Upon closer review of the New DE Order since the April 25, 2006 release date, and unsuccessful attempts to restructure the transaction, Council Tree recognizes that it will be virtually impossible as a practical matter to reconstruct or develop new business plans and to secure new financing alternatives for Designated Entities as long as the new rules are on the books. A mere postponement of the AWS Auction is not sufficient under these circumstances.

9. For the same reasons that Council Tree's investors abandoned investment in its business plan, it is not feasible to attract alternative sources of capital with reasonable terms under the new rules. Prudent investors and lenders are unwilling to accept the compound risks presented by the new restrictions on reselling or wholesaling of the company's services and the unduly long ten-year time horizon of the revised unjust enrichment rules.

10. As a result of the New DE Order and its devastating effect on the negotiated transaction and the credibility of the Commission as the administrator of the Designated Entity program, Council Tree did not file a 175 short form application on May 10, 2006, the initial deadline date.

11. As a direct result of the New DE Order, Council Tree has suffered the substantial and concrete harm of:

    a. loss of the transaction as described above, upon which it had labored for a year;

    b. loss of the opportunity to participate as it had planned in the once-in-a-generation spectrum allocation represented by the AWS Auction; and,

c. loss of the largest and most important element of the business plan of Council Tree, namely an investment opportunity in the wireless industry as it had planned.

12. This substantial and concrete harm to Council Tree, will be irreparable in three key respects:

a. As detailed above, there is simply no "replacement opportunity" for the AWS Auction. No comparable array of spectrum licenses are available now or likely to be available in the private market or through future spectrum auction.

b. There is no avenue for redress for the economic harm caused to Council Tree because there is no basis of which we are aware for a claim for monetary damages against the United States in this context.

c. Like many small entrepreneurial companies, Council Tree's existence as a business depends on continued participation in successful transactions. If precluded from participation in this AWS Auction by the New DE Order, this will threaten the very existence of Council Tree as a sustainable business.

d. Unwinding the AWS Auction once it has occurred will be a prolonged, complex, expensive and uncertain process. By that time, the industry will have become more consolidated and more difficult to enter, investors will have long ago moved on to other areas and opportunities, and the cost of money will have likely increased even more, increasing the economic market entry barriers for Council Tree and BNC.

13. The balance of interests between other private parties interested in the AWS Auction strongly favors a current stay rather than a possible future unwind of this auction. If the AWS Auction is not stayed now, and the New DE Order is not stayed or rescinded, four severe results will occur:

a. Several billion dollars of deposits can reasonably be expected to be made on July 17, 2006, and these will potentially be tied up for a prolonged period without any interest (per federal law).

b. The auction will proceed under a cloud of appeals. In our experience in federal spectrum auctions (as well as oil and gas and surplus property auctions), uncertainty inevitably means fewer and less aggressive bidders. This uncertainty means fewer dollars to the federal government and could threaten the Commission's ability to meet the reserve price set for the AWS Auction.

c. Conducting the AWS Auction now, subject to the dismissal of the auction results and a need to conduct a re-auction following judicial review, will reveal bidding strategies that will harm many prospective bidders in a future auction.

d. Further delay of the AWS Auction to address the grave flaws in the New DE Order will not irreparably harm any party and will help ensure certainty going forward. On the other hand, if the matter is not addressed now, there will be a prolonged course of appeals and litigation – as was seen in the NextWave litigation – which will severely undermine the certainty of the auction process in general.

Steve C. Hillard Date 5/25/06

CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, a secretary to the law firm Leventhal Senter & Lerman PLLC, hereby certify that a true and correct copy of the foregoing "Further Supplement to Motion for Expedited Stay" was sent this 25th day of May, 2006 to each of the following via the methods identified:

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* by hand
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/s/ *Rebecca J. Cunningham*
Rebecca J. Cunningham